IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1032

DONALD HUDKINS, individually and as Superintendent of the Indiana State Farm,
NORMAN McDONALD, individually and as the Assistant Superintendent of the Indiana State Farm,
PHILIP H. BADGER, individually and as the Director of Treatment and Classification at the Indiana State Farm,
ROBERT E. PARSONS, individually and as the Recreation Director at the Indiana State Farm,
DALE PAT NIXON, individually and as a Counselor at the Indiana State Farm, and
ROBERT HEYNE, individually and as the Commissioner of the Department of Correction,

Petitioners,

vs.

ROY BUISE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana
DONALD P. BOGARD
Chief Counsel
JOHN D. SHUMAN
Assistant Attorney General
Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6239
Attorneys for Petitioners

C. E. Pauley & Co., Inc., Indianapolis

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

DONALD HUDKINS, individually and as Superintendent of the Indiana State Farm,
NORMAN McDONALD, individually and as the Assistant Superintendent of the Indiana State Farm,
PHILIP H. BADGER, individually and as the Director of Treatment and Classification at the Indiana State Farm,
ROBERT E. PARSONS, individually and as the Recreation Director at the Indiana State Farm,
DALE PAT NIXON, individually and as a Counselor at the Indiana State Farm, and
ROBERT HEYNE, individually and as the Commissioner of the Department of Correction,

Petitioners,

vs.

ROY BUISE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the Seventh Circuit, rendered in these proceedings on September 26, 1978.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals dated September 26, 1978, published at 584 F.2d 223, appears at Appendix A *infra*. The findings and judgment of the trial court were entered on July 8, 1977, and that decision is unreported at this time, but is attached as Appendix B *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered September 26, 1978. This petition for certiorari is timely in that it is filed less than 90 days from that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Rule 19 (1)(b) of the Rules of this Court. Petitioners assert that the Seventh Circuit has decided an important federal question contrary to the applicable decisions of this Court.

QUESTION PRESENTED

Whether "jailhouse lawyering" is an "associational right" protected under U.S. Const. Amend. I.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. U.S. Const. Amend. I.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A.

Nature of the Case

This case involves an inmate, Roy Buise, (hereafter Buise), who is in the custody of the Indiana Department of Correction. Buise was transferred from the Indiana State Prison to the Indiana State Farm to fill a job as a librarian, and was subsequently transferred back to the Prison. Following the latter transfer he brought suit alleging a violation of his constitutional rights.

B.

Course of the Proceedings Below

Buise, while an inmate of the Indiana State Prison, in February, 1975, filed his amended complaint under 42 U.S.C. § 1983 contending that he had been wrongfully transferred to the Indiana State Prison from the Indiana State Farm. The plaintiff demanded damages and that his transfer be rescinded, but did not demand declaratory or injunctive relief relating to any other inmate.

After trial, the District Court found that the plaintiff had been transferred "in part on plaintiff's activities in taking it upon himself to establish a law library, writ room and inmate council, [and] in part because it was felt that he was pursuing objectives during working hours, not related to duty assignment, as librarian." Amended Findings, par. 24, Appendix B, *infra*, p. 22.

The trial court viewed the issues as being "whether plaintiff was entitled to a due process hearing before he was returned to the State Prison and whether the transfer was made in retaliation for engaging in constitutionally protected activity." (Appendix B, *infra,* p. 21.). After making the above finding, the trial court found that there was no constitutional violation in the transfer. Appendix B *infra, pp.* 23-24.

The Court of Appeals, however, made its own and different findings from the record. That Court decided that the Plaintiff has been transferred "largely for four reasons:

> 1. He was rendering legal assistance to other prisoners at the State Farm;
> 2. He was attempting to establish a law library there;
> 3. He was attempting to establish a writ department there;
> 4. He was attempting to establish an inmate council." Appendix A *infra,* pp. 4-5.

This new version of the facts was the basis for the determination by the Court of Appeals that each of the above activities was constitutionally protected, and that the plaintiff was transferred in retaliation for those activities.

The Court of Appeals underpinned its finding that the "inmate council" activity was constitutionally protected not from the record, but rather because "we were advised without objection at the oral argument, [that] the inmate council requested here was one that would oversee the operation of the writ room." Appendix A *infra,* p. 14; cf. *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119 (1977).

The Court of Appeals remanded the case to the District

Court for further proceedings under the standards of *Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977) and *Procunier v. Navarette,* — U.S. — (1978).

REASON FOR GRANTING THE WRIT

I.

"Jailhouse Lawyering" is not a protected "associational" right under U.S. Const. Amend. I.

Although persons outside prison walls have been held to have "the right to cooperate in helping and advising one another in asserting their rights" *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971), there is no precedent for extending the right to the practice of law by laymen. The distinction is obvious—lawyering, be it "jailhouse" or otherwise, is not mutual self-help. The practice of law itself is not a constitutional right. *Brotherhood of Railway Trainmen v. Virginia,* 377 U.S. 1 (1964).

An incarcerated person loses only those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" *Pell v. Procunier,* 417 U.S. 817, 822 (1974). However, there is no precedent that incarcerated persons have greater First Amendment rights than the free population. On the contrary, prisoner's rights are particularly curtailed in the area of "associational" rights. *Jones v. North Carolina Prisoners' Union, supra.*

In the present case, by ascribing to "jailhouse lawyering" the status of a protected "associational" First Amendment right, the Court of Appeals has granted inmates First Amendment rights not accorded to free laymen. And in the absence of a finding that "jailhouse lawyering" falls within First Amendment protection, the Court of Appeals

could not have overturned the judgment of the trial court. The District Court made specific findings that the transfer was proper and that there were no constitutional violations. However, the Seventh Circuit ignored those findings and their support in the record, and rewrote the findings. The Petitioners would assert that the District Court's decision was correct, but even assuming, *arguendo,* that Buise's transfer was in retaliation for the exercise of a protected right, it is well settled by the decisions of this Court that such transfer could have been effected for any reason or no reason at all. *Meachum v. Fano,* 427 U.S. 215 (1976); *Montayne v. Haymes,* 427 U.S. 236 (1976); *Mount Healthy City Board of Education v. Doyle, supra.* The Seventh Circuit has misinterpreted those cases, and has reached a contrary result.

Therefore, if the Court of Appeals decision is permitted to stand, inmates in the Seventh Circuit will have a greater "associational" First Amendment right than the free population, *i.e.* the right to practice law. This is not to say, however, that "jailhouse lawyering" might not be, in the absence of alternatives, a necessary adjunct of rights of access to courts. *Johnson v. Avery,* 393 U.S. 483 (1969). But the right of inmates to *have* a "jailhouse lawyer" is not at issue in this case. Rather, at issue is the plaintiff's "right" to *be* a "jailhouse lawyer". It is most anomalous to hold as did the Court of Appeals, that "jailhouse lawyering" is a First Amendment "associational" right and yet not a First Amendment right of any free layman.

The Petitioners would, therefore, submit that the Court of Appeals committed gross and novel error in characterizing "jailhouse lawyering" as a First Amendment right, contrary to the controlling precedents of this Court.

CONCLUSION

For the foregoing reasons, petitioners urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

JOHN D. SHUMAN
Assistant Attorney General

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6239
Attorneys for Petitioners

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 77-1731

ROY BUISE,

Plaintiff-Appellant,

v.

DONALD HUDKINS, individually and as Superintendent of the Indiana State Farm, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
Civil Action No. IP 74-288-C.

William E. Steckler, *Judge.*

HEARD FEBRUARY 28, 1978—DECIDED SEPTEMBER 26, 1978

Before CUMMINGS and TONE, *Circuit Judges*, and McMILLEN, *District Judge.**

CUMMINGS, *Circuit Judge.* Plaintiff is presently a prisoner confined in the Indiana State Prison in Michigan City, Indiana. In February 1975, he filed an amended complaint under the Civil Rights Act (42 U.S.C. § 1983) asserting that he was wrongfully transferred to the prison from the Indiana State Farm in Greencastle (Putnamville), Indiana, in March 1974 due to his attempts to assist other prisoners

* District Judge Thomas R. McMillen of the Northern District of Illinois is sitting by designation.

in the preparation of legal documents, to have a law library provided at the State Farm and to establish an inmate council at the State Farm. Five of the defendants are officers or employees of the State Farm and the sixth defendant is the Commissioner of the Indiana Department of Correction.

According to the amended complaint, on January 29, 1974, plaintiff, then a prisoner at the Indiana State Prison, was transferred to the Indiana State Farm to become its librarian.[1] After his transfer, plaintiff served as a jailhouse lawyer in assisting other inmates in legal matters. Defendants allegedly told him not to assist other prisoners with their legal work. On March 13, 1974, defendant Badger, the Director of Treatment and Classification at the State Farm, assertedly wrote a memorandum to the warden of the Indiana State Prison indicating that plaintiff was being transferred back to that institution due to his legal activities at the State Farm. In part, the memorandum stated as follows:

> "Mr. Buise has done well and is to be commended for his work in the library, however, his insistence in trying to establish a writ writing procedure and an inmate council at this institution has caused some problem for the staff. We feel it is in his best interest to be returned to your institution."

On the following day, plaintiff was transferred from the minimum security State Farm to the maximum security Indiana State Prison.

[1] The district judge found that when Buise was transferred, he was informed that his job assignment would be as librarian, not as writ writer. At the oral argument we were informed that defendants had agreed not to argue below that the restrictions on Buise's activity were proper on the ground that Buise had accepted those restrictions as conditions for a preferred transfer. Therefore the district court made no findings of fact on whether the transfer was conditional and we need not consider the legal sufficiency of any condition as a justification for defendants' conduct.

One of the theories of the complaint was that plaintiff's transfer to Michigan City because of his attempt to provide legal assistance to other prisoners and to establish a law library deprived him of constitutional rights. Defendants' refusals to permit a law library and to allow plaintiff to assist other State Farm prisoners with their legal problems are also said to have deprived him of constitutional rights. Plaintiff requested a declaratory judgment and an injunction requiring defendants to return him to the Indiana State Farm in his position as librarian and to provide an adequate law library. He also requested $20,000 in compensatory damages and $50,000 in punitive damages.

On July 8, 1977, the district court released its findings of fact and conclusions of law in this matter. The court found that defendant Badger told a counselor at the State Prison to advise plaintiff that his job assignment at the State Farm would be as a librarian and not as a writ writer. Both of them so advised plaintiff. During his stay at the State Farm, prisoners sought legal advice and assistance from plaintiff. Judge Steckler found that there was no institutional policy concerning inmates assisting each other in preparing legal papers on their own time but that there was an informal policy against inmates assisting other inmates with their legal problems while they were supposed to be performing an assigned duty. He also found that there was an informal policy against using the library as a writ room. State Farm had no law library, writ room or inmate council, and legal assistance from the Public Defender was available to inmates only on request. During his stay at the State Farm, petitioner sought the establishment of a law library, writ room and inmate council.

The district court also found that petitioner was transferred back to the State Prison partly because he sought

to establish a law library, writ room and inmate council and because petitioner was pursuing [legal assistance] objectives during working hours. Judge Steckler stated that petitioner performed his duties in the library adequately and "completed his work early enough to allow free time." At the time of petitioner's transfer, defendant Badger wrote a letter commending petitioner's work in the library at the State Farm but stated that "in his opinion plaintiff had not lived up to the agreement on writ writing and that his efforts to establish a writ writing procedure and inmate council had caused some problems for the staff." Petitioner was returned to the Indiana State Prison on March 14 where the conditions were not as advantageous for plaintiff as those at the State Farm.

The district court concluded that at the time of his transfer, prison officials had the authority to transfer inmates at their discretion and specifically that they had the authority to return petitioner to the State Prison. The court also concluded that petitioner had no established right to be a writ writer while on duty and that he failed to prove any damages. We reverse and remand for the possible assessment of damages and injunctive relief.

I. CONSTITUTIONAL VIOLATIONS

Both parties appear to agree that plaintiff was transferred from the State Farm to the State Prison largely for four reasons (Tr. 149-150):[2]

1. He was rendering legal assistance to other prisoners at the State Farm;

[2] Although defendants hint that plaintiff also was transferred because of his psychological inaptitude as librarian (Br. 4), the amended findings of fact by the district court do not include that factor as a basis for the transfer. In fact, the district court found that plainiff "performed his duties in the library adequately." Amended Finding No. 25.

2. He was attempting to establish a law library there;
3. He was attempting to establish a writ department there;
4. He was attempting to establish an inmate council there.

Plaintiff contends that each of these activities is an impermissible basis for transfer and further contends that he has a right to render legal assistance and a right to an adequate law library.[3] The defendants insist that the transfer was proper and also dispute plaintiff's claimed rights to be a jailhouse lawyer and to have a law library available.

A. *Jailhouse Lawyer Activities*

While not so identified by the parties, two separate claims can be drawn from Buise's jailhouse lawyer activities. The first is Buise's claim that his own rights were violated when he was transferred assertedly in retaliation for his jailhouse lawyer activities, and the second is his claim on behalf of other inmates that their right of access to the courts was infringed by his transfer. There is no contention that plaintiff does not have standing to assert his own interests and *Johnson v. Avery,* 393 U.S. 483, establishes that he can raise the claims of the other inmates because in *Johnson* only the jailhouse lawyer was a party and yet the decision rested on the denial of access to the courts for his fellow inmates. See 393 U.S. at 487; accord *Haymes v. Montayne,* 547 F.2d 188, 191 (2d Cir. 1976), certiorari denied, 431 U.S. 967; see generally Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 Yale L.J. 599 (1962).

[3] It is not clear why plaintiff did not also request injunctive and declaratory relief as to the inmate council and writ room.

Although the district court found that plaintiff was transferred in part because he was writing writs during working hours, the evidence is overwhelming that to the extent the transfer was based on writ writing, it was based on writ writing at any time and not during working hours. It is uncontradicted that plaintiff was ordered not to assist other prisoners in legal matters at any time, and apparently he was never told that this restriction applied only during working hours (Tr. 33, 72-73, 165, 166, 206, 207). Admittedly there is no documentary evidence of a policy limited to working hours. Moreover, while defendants claimed that the transfer was based on the fact that plaintiff "would not adhere to the institutional policy" (R. 165), they introduced only one incident showing a violation of the supposed informal policy against writ writing during working hours,[4] compared to the 25 times per day that advice was sought from Buise (Tr. 37). In this context, it was clearly erroneous to find that Buise was transferred for writing writs during working hours.

From the perspective of the remaining inmates, Buise's transfer for writing writs violated their constitutional right of access to the courts (*Johnson v. Avery*, 393 U.S. 483) if it left them without an alternate means of access to the courts. The defendants admit that no law library was available and do not deny that Buise was the State Farm's only jailhouse lawyer but insist that the availability of the Public Defender is sufficient to assure access.

It is well established, however, that the state bears the burden of demonstrating the adequacy of such an alternate means of access. See, *e.g.*, *Sostre v. McGinnis*, 442 F.2d 178, 201 (2d Cir. 1971) (*en banc*), certiorari denied,

[4] Instead, the district court found that Buise completed his work as librarian "early enough to allow free time." Amended Finding No. 26.

404 U.S. 1049, 405 U.S. 978; *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971), certiorari denied, 409 U.S. 968. *Bounds v. Smith*, 430 U.S. 817, 825, adds that mere availability is not enough and that the key inquiry is whether a "reasonably adequate opportunity" to present claimed violations of fundamental constitutional rights is provided. Here the state merely asked the district court to take judicial notice of an Indiana statute assertedly requiring that certain assistance be provided by the state's Public Defender,[5] and the only evidence adduced was Superintendent Hudkins' statement on cross-examination that the Public Defender's availability "was entirely at the discretion of the office of the public defender • • • people would write to them and they would come down on occasion" (Tr. 101-102).[6] Neither of these attempts to prove access is sufficient. Judicial notice of a statute requiring certain services, even assuming the requirements fully cover inmates' needs, is insufficient because it does not follow from the existence of the statute that an alternative actually exists. The Public Defender may disregard the statute, or, more likely, the office simply may lack the resources necessary to provide meaningful access at each of the state's institutions. In this context a mere reference to the statute does not carry the state's burden of proof of adequate alternatives. Nor can the state rely on the fact that at inmates' request the Public Defender would come down "on occasion." In fact, this type of availability is similar to the situation in *Johnson v. Avery*, 393 U.S. 483, 489, that prompted the Supreme Court to require an inquiry into the use of writ writers. In addition, the fact that 25 inmates per day contacted

[5] See Ind. Code 33-1-7-2.

[6] See Amended Finding of Fact No. 19. To the extent that Finding 19 implies that the Public Defender responds to each request, it is unsupported by the record.

Buise is itself an indication that he was the only real source of legal advice for the inmates. In the absence of a "regular system of assistance by public defenders" (*Id.* at 489), the state should be able to prove before it eliminates other means of access that absent unusual circumstances the Public Defender reponds in a reasonable manner to each inmate request and that inmates have some awareness of this alternative. See generally *Bounds v. Smith*, 430 U.S. 817, 825. Having failed to do so here, the state cannot rely on the availability of the Public Defender.

Apparently recognizing the inadequacy of the proof regarding the Public Defender, the state argues that accepting Buise's claim that he could not be transferred would mean that a prison could never transfer its last writ writer, no matter what his misconduct and no matter what the prison's administrative needs. In practice, it is not clear that such a dilemma would ever arise, since the state could transfer the inmate and simply arrange to substitute a suitable alternative means of access to the courts. Whatever the theoretical merit of the state's argument, it is not properly presented here because, in light of our finding above, the state did not transfer Buise for misconduct or for a proper administrative purpose, but transferred him for writ writing and other protected activities. Thus even assuming the inmates' need for a writ writer could be balanced against the need to punish or move a writ writer by transfer (cf. *Laaman v. Perrin*, 435 F.Supp. 319, 328-329 (D. N.H. 1977)), no proper administrative or punitive reason for transfer appears on this record.

For these reasons, Buise would have been entitled to declaratory relief that the transfer was improper and to a retransfer if he so desired. However, since this theory is based on Buise's assertion of the rights of other inmates, in the absence of proper class certification, plaintiff offers no reason why he should be able to recover damages for a violation of the rights of other inmates, particularly in light of the Supreme Court's emphasis in *Carey v. Piphus*, 46 U.S.L.W. 4224, on the compensatory nature of Section 1983 damages and the fact that the district court would be unable practically to require Buise to return the damages to the other inmates.[7]

In order for Buise to recover damages for being transferred as a result of performing jailhouse legal services, he must prove that he had an independent right to serve as a jailhouse lawyer for other inmates. The state's argument that even if he did so prove it could still transfer him because it can make a transfer "for whatever reason or for no reason at all" (*Meachum v. Fano*, 427 U.S. 215, 228) is unpersuasive.[8] While *Meachum* held that a prisoner has no inherent due process interest in not being transferred sufficient to justify a hearing, it and its companion case, *Montayne v. Haymes*, 427 U.S. 236, did not hold that a transfer could be made in retribution for the exercise of

[7] There is no compelling need to allow Buise to recover the inmates' damages since in light of this opinion and its recognition of a constitutional violation it may not be difficult for the other inmates to obtain legal representation to vindicate their access rights.

[8] The state argues that the transfer was not a punishment because the prison officials deemed it to be administrative rather than punitive. While it may be true that some transfers conceivably might not serve as a penalty for participation in protected conduct, the test for whether a transfer is sufficiently punitive would not be whether the prison officials deemed it punitive. Rather it would be an inquiry into, among other things, the relative conditions in the institutions and the harms of dislocation itself, and how the inmate perceived them. See *United States v. Montayne*, 505 F.2d 977, 981-982 (2d Cir. 1974), reversed on other grounds, 427 U.S. 236, on remand, 547 F.2d 188, 191 (2d Cir. 1976). Here it is undisputed as Buise testified (Tr. 26-30) that the conditions at the Indiana State Prison were considerably less attractive than those at the State Farm, so that his transfer penalized his exercise of legal activities in that it caused him to be placed in less desirable surroundings.

protected rights. See *Montayne v. Haymes*, 427 U.S. 236, 244 (Stevens, J., dissenting). Instead, it is well established that an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for a different reason, would have been proper. As the Supreme Court stated in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283, a school teacher discharge case, "Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him • • •, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. *Perry v. Sindermann*, 408 U.S. 593 (1971)." Put another way, while plaintiff may not have a due process interest or expectation in remaining at the same institution, he does have a First Amendment interest or expectation in not being punished for the exercise of activity protected under that provision.

The question whether a transfer based on writ writing is actionable therefore becomes the question whether jailhouse lawyering is a protected activity. While much attention has been focused on an inmate's right to be his own jailhouse lawyer (*Sigafus v. Brown*, 416 F.2d 105 (7th Cir. 1969); *Wren v. Carlson*, 506 F.2d 131, 133 (D.C. Cir. 1974)) and to obtain assistance from other inmates (*Johnson v. Avery*, 393 U.S. 483), less attention has been given to whether serving as a jailhouse lawyer merits any constitutional protection. But cf. *Ayers v. Ciccone*, 303 F.Supp. 637 (W.D. Mo. 1969), appeal dismissed, 431 F.2d 124 (8th Cir. 1970). Outside prison walls, the Supreme Court has recognized that "the right to cooperate in helping and advising one another in asserting their rights" (*United*

Transportation Union v. State Bar of Michigan, 401 U.S. 576, 579) is protected by the First Amendment in a variety of contexts. See, *e.g.*, *NAACP v. Button*, 371 U.S. 415; *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1; *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576; *In re Primus*, 46 L.W. 4519. Whether the same type of activity is protected inside the prison is determined by applying the principle of *Pell v. Procunier*, 417 U.S. 817, 822, that an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." In particular, it has been emphasized that "perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are • • • associational rights." *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125.

In *Aikens v. Jenkins*, 534 F.2d 751, 755 (7th Cir. 1976), a case involving restrictions on prisoners' literature, we held that "the burden of showing • • • special characteristics justifying restrictions on First Amendment rights is on those who seek to impose the restrictions." Whether that same burden is applicable here is arguable given the association rather than speech interests implicated and given the Supreme Court's statement in *Jones* that "the burden was not on [prison official] appellants to show affirmatively" that the prisoners' First Amendment activity—a prisoners' union—"would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order.' " 433 U.S. at 128. At the least, however, when a regulation restrictive of First Amendment rights is questioned, the state correctional officials must explain the purpose of the policy and present some indication of its necessity, as was done in *Jones*. See 433 U.S. at

126-127. Otherwise the necessary deference to the decisions of prison administrators (*Id.* at 125) can only be a blind allegiance inconsistent with the notion that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims." *Procunier v. Martinez*, 416 U.S. 396, 405.

Apparently because the trial focused on the denial of court access from the perspective of the inmates, the prison officials here did not seek to provide any necessity of a restriction on jailhouse lawyering. Of course, as other cases have established, it is possible to develop justifications for restricting at least certain types of inmate lawyering under certain circumstances. Thus writ writing for a profit has been prohibited (*e.g., McKinney v. DeBord*, 324 F.Supp. 928 (E.D. Cal. 1970)), and an inmate has no right to be a writ writer during times when he is assigned to perform other work. See generally *Beathan v. Manson*, 369 F.Supp. 783 (D. Conn. 1973). But here the policy as we have determined covered any jailhouse lawyering during all hours, making less applicable the justifications for less restrictive limitations on the activity.

Although Buise may have First Amendment associational rights in writ writing (see *In re Primus*, ... U.S. ...., ...), defendants may be able to show on remand that the writing curb was validly imposed as an objective of prison administration.[9] See *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129. If writ writing was the predominant factor in Buise's transfer and its prohibition was unjustified, he is not entitled to damages (*Mount Healthy City*

[9] It is evident from *Johnson v. Avery*, 393 U.S. 483, that absent special circumstances or alternate means of court access, the mere fact that a jailhouse lawyer is not schooled in the law cannot in itself justify prohibiting his consulting with other inmates on legal matters. See *Cross v. Powers*, 328 F.Supp. 899, 904 n. 3 (W.D. Wis. 1971).

Board of Education v. Doyle, 429 U.S. 274, 287) even though the three other reasons for his transfer were constitutionally protected activities. Therefore on remand the district court should first redefine the bounds of the prison's writ writing curb in light of this opinion; then the parties should present evidence on the need for such a restriction.[10]

B. *Law Library Requests*

An alternate reason given for plaintiff's transfer from the State Farm was his attempt to establish a law library there. Ironically, *Bounds v. Smith*, 430 U.S. 817, was decided about two months prior to the district court's decision and held that prison authorities must provide prisoners with adequate law libraries in the absence (as here) of adequate assistance from persons trained in the law. Thus Buise was requesting what has since been held to be his constitutional right.

Even in cases in which what is requested is not something to which an inmate has a constitutional right, an inmate's request for improved conditions has been held constitutionally protected. See, *e.g., Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) (*en banc*), certiorari denied, 404 U.S. 1049, 405 U.S. 978; *Haymes v. Montayne*, 547 F.2d 188, 191 (2d Cir. 1976), certiorari denied, 431 U.S. 967; *Carothers v. Follette*, 314 F.Supp. 1014 (S.D. N.Y. 1970). In fact, since as *Bounds* indicates, Buise could have filed suit to vindicate this right, and during such a suit might have been asked whether he first sought relief from prison officials (cf. *Paden v. United States*, 430 F.2d 883 (5th Cir. 1970), affirmed in part, 402 U.S. 33), making a library

[10] In particular, for instance, the court should determine whether the justifications for restrictions on writ writing suggested in Justice White's dissent in *Johnson v. Avery*, 393 U.S. 483, 499-500, 502, are applicable in the apparently non-violent atmosphere of the State Farm.

request to prison officials can hardly be penalized. There is no proof or even a claim that Buise's request was particularly vexing or disruptive. In this context, the request was constitutionally protected. For the reasons stated in Part IA above, a transfer based on such constitutionally protected speech is improper. Moreover, for the reasons stated in *Bounds*, the prison officials were wrong in not approving Buise's request for a prison library.

C. *Writ Department and Inmate Council Requests*

The remaining reasons for plaintiff's transfer, his requests to establish an inmate council and a writ department, are also protected activities for the reasons noted above even though the items requested may not be constitutional rights.[11] We need not decide whether it would have been protected to request establishment of an inmate council that would act like a union, because as we were advised without objection at the oral argument, the inmate council requested here was one that would oversee the operation of the writ room. Since these requests are protected activities, they were not a proper basis for transfer.

II. RELIEF ON REMAND

Because the transfer violated the rights of other inmates, plaintiff is entitled to declaratory and injunctive relief that his transfer was improper. Also, *Bounds*, requires granting plaintiff's request that the State Farm be required to establish a law library unless a reasonable alternative means of access to the courts is developed.

Whether Buise is entitled to damages depends on whether he was transferred in retaliation for the exercise of his constitutional rights. Thus the district court first should

[11] We therefore need imply no position on whether a writ room is required under *Johnson v. Avery*, 393 U.S. 483.

determine with greater specificity why Buise was transferred. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287, outlines the standards for evaluating whether retaliation for protected conduct played a role sufficient enough in the decision to transfer to make that decision impermissible. It asks first whether the protected conduct was a substantial or motivating factor in the decision and then whether the same decision would have been reached in the absence of the protected conduct. See *Ayers v. Western Life Consolidated School District*, 555 F.2d 1309, 1314 (5th Cir. 1977).

If the reason under the *Mount Healthy* standards for Buise's transfer was his requests for a law library, writ department and inmate council, damages should be awarded. If, on the other hand, these requests were not the reason for Buise's transfer, it follows that Buise was transferred for his writ-writing activity. Under this latter possibility, it will be necessary to evaluate the state's justification for prohibiting writ writing in order to determine whether Buise had a right to be a writ writer and therefore is entitled to damages.

On the assumption that plaintiff was transferred in retaliation for the exercise of a constitutional right, in order to guide the district court on remand, we must consider two of defendants' objections to the allocation of damages. First, defendants assert that they are protected by good faith immunity. Under *Procunier v. Navarette*, 46 LW 4144, state prison officials are entitled to such immunity unless they "knew or reasonably should have known" that the action they took with respect to a prisoner would violate his federal constitutional rights. If the constitutionally violative action was punishment in response to requests for improved conditions of plaintiff's own con-

finement, then the good faith defense is clearly unavailable. As the cases cited in Part IB indicate, the right of prisoners to request improved conditions was as clear when these events took place in 1974 as it is now.

If plaintiff's transfer was in retaliation for his writ-writing activity, the law is not so clear. On the one hand, the right of other inmates to Buise's services, in the absence of an available alternative, was clear in 1974. See *Johnson v. Avery,* 393 U.S. 483; *Procunier v. Navarette,* 46 LW 4147 (Stevens, J., dissenting); *Knell v. Bensinger,* 522 F.2d 720 (7th Cir. 1975).[12] On the other hand, Buise's own First Amendment associational rights may not have been clearly established in 1974 before *Pell v. Procunier,* 417 U.S. 817, made certain that prisoners had those First Amendment rights not inconsistent with their status. See generally *Procunier v. Navarette,* 46 LW 4144.

Thus this case presents the question of whether conduct that clearly was violative of someone's rights can be immunized as having been taken in good faith if that conduct was not clearly violative of the rights of the person who later sues. While a literal application of the standard as stated in some Supreme Court cases (see, *e.g., Procunier v. Navarette,* 46 LW 4144[13]) would mean that the prison officials' acts under such circumstances were in good faith, that standard is too narrow to apply here. Each of the Supreme Court cases whose language might imply this

[12] Damages were not awarded in *Knell* because "the issue of whether a temporary denial [of access to the courts] could be effectuated for a fixed and limited duration in response to violations of prison regulations in the interests of institutional safety and security was not foreclosed" by prior judicial precedents. 522 F.2d at 727.

[13] For example, in *Navarette* the Court stated the standard by quoting from *Wood v. Strickland,* 420 U.S. 308, 322, to the effect that "he will not be shielded from liability if he acts 'with such disregard of the [plaintiffs] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 46 LW at 4146.

result has involved actions that clearly violated the rights of the inmate who sued, so that the question presented here was not raised. Almost by definition, a prison official who acts in violation of clearly established rights of all the inmates in his institution (possibly save one) can hardly be said to have acted in "good faith." The purposes of granting good faith immunity are not served by immunizing such conduct. Therefore, the state officials cannot escape damages by claiming immunity.

Finally, defendants contend, and the district court agreed, that plaintff did not prove any damages. We disagree. Plaintiff testified regarding the less desirable circumstances at the State Prison. His room at the State Farm "would be almost like having an apartment in free society compared to what [he] had at the Prison," and meals at the Prison of course were also inferior. At the Farm, plaintiff could move about freely, and the atmosphere had considerably less tension. Admittedly, it is difficult to move from these comparisons to a compensatory dollar amount, but such difficulty cannot preclude an award of more than nominal damages. See *Mack v. Johnson,* 430 F.Supp. 1139, 1150-1151 (E.D. Pa. 1977). Other courts have translated a series of conditions into a realistic dollar figure, and the district court should do so on remand. See, *e.g., United States* ex rel. *Larkins v. Oswald,* 510 F.2d 583 (2d Cir. 1975); *Wright v. McMann,* 321 F.Supp. 127 (N.D. N.Y. 1970), affirmed in pertinent part, 460 F.2d 126 (2d Cir. 1972), certiorari denied, 409 U.S. 885; see generally *Little v. Walker,* 552 F.2d 193 (7th Cir. 1977).

In addition to a declaratory judgment, plaintiff may still wish to secure reinstatement as librarian at the State Farm unless his motion to withdraw his request for a preliminary injunction, granted in September 1975 (see R. 97-99), was

intended to apply to a permanent injunction as well. If so, his request for establishment of a law library at the State Farm would also be moot. See *Kerrigan v. Boucher*, 450 F.2d 487, 488-489 (2d Cir. 1971). If on remand the district court holds that petitioner's transfer was mainly for writ writing and that the prohibition on his writ writing was warranted, he should receive no damages.

Reversed and remanded for further proceedings consistent herewith.

McMillen, J., concurring. In view of footnote 1, *supra*, I concur with the foregoing decision, except that I would not remand for the determination of damages arising from plaintiff's transfer to the State Prison. He is, however, entitled to provable damages on his own behalf for interference with his constitutional rights as an advocate for certain innovations at the State Farm.

Plaintiff seeks damages for his inferior living conditions at the State Prison, despite the fact that he lost no good time and was not otherwise punished. Plaintiff had no constitutional right to remain at the State Farm. Although defendants have the right to reassign him to the prison at any time without any reason or hearing, they are nevertheless now being subjected to the possibility of paying damages for doing what they had a right to do. Declaratory or injunctive relief should fully resolve plaintiff's grievance. To award him damages for living under less desirable conditions than he enjoyed at the Farm is an unmerited windfall and an unwise departure from precedent.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROY BUISE,
Plaintiff,
vs.
DONALD HUDKINS, et al.,
Defendants.
} CIVIL No. IP 74-288-C

AMENDED
FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Roy Buise, brought this action for injunctive and declaratory relief and for money damages pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 2201 and § 2202. Plaintiff, an inmate at the Indiana State Prison who was transferred to the State Farm as librarian, contends that his return to the Indiana State Prison from the State Farm without a fact finding hearing deprived him of his right to due process of law under the Fourteenth Amendment. Plaintiff also alleges that he was transferred in retaliation for engaging in constitutionally protected activities in violation of the Fourteenth Amendment. The activities involved included assisting other inmates in preparing writs and attempting to establish a law library, writ room and inmate council at the State Farm. The basic issues presented by this complaint were whether plaintiff was entitled to a due process hearing before he was returned to the State Prison and whether the transfer was made in retaliation for engaging in constitutionally protected activity.

This cause came before the Court for trial, and the Court having duly considered the evidence and being fully advised in the premises now makes the following findings of fact:

FINDINGS OF FACT

1. Plaintiff, Roy Buise, is currently a prisoner at the Indiana State Prison in Michigan City, Indiana.

2. From January 29, 1974 to March 14, 1974, plaintiff was assigned as librarian at the Indiana State Farm at Putnamville, Indiana.

3. Defendant Donald Hudkins is Superintendent of the Indiana State Farm, defendant Norman McDonald is the Assistant Superintendent of the Indiana State Farm, defendant Philip H. Badger is the Director of Treatment and Classification at the State Farm, defendant Robert E. Parsons is Director of Recreation at the State Farm, and defendant Dale Pat Nixon is a counselor at the State Farm. Defendant Robert Heyne was Commissioner of the Indiana Department of Correction during the time in question.

4. During the period plaintiff was at the State Farm, Mr. Hudkins was incapacitated and Mr. McDonald was Acting Superintendent although Mr. Hudkins was advised of plaintiff's return to the prison and was in agreement with the decision.

5. Prior to January 29, 1974, State Farm officials determined that it would be advantageous to obtain a long term inmate to run the library at the State Farm.

6. The reason for this decision was to provide stability for the position of inmate librarian since inmates at the State Farm generally have sentences of less than a year and there is a rapid turnover in inmate population.

7. Mr. Clark Matotte, a counselor at the State Prison, recommended plaintiff's name to defendants for that position.

8. Mr. Matotte advised defendants that plaintiff was a writ writer, or legal advisor, at the prison.

9. Defendant Badger accepted Mr. Matotte's recommendation but told Mr. Matotte to advise plaintiff that his job assignment at the State Farm would be as librarian, not as a writ writer.

10. Mr. Matotte so advised plaintiff before his transfer, and defendant Badger so advised him after his transfer to the State Farm.

11. Plaintiff was transferred to the State Farm on January 29, 1974 and was put in charge of the library.

12. During plaintiff's stay at the State Farm, prisoners at the State Farm sought legal advice and assistance from plaintiff.

13. On one occasion plaintiff, on his own time, assisted another inmate in preparing a writ.

14. On one occasion plaintiff was present as librarian while the library was being used to prepare writs during library hours.

15. During the period in question there was no institutional policy concerning inmates assisting each other in preparing legal papers on their own time.

16. There was an informal policy against inmates assisting other inmates with their legal problems while they were supposed to be performing an assigned duty.

17. There was an informal policy against the library being used as a "writ room."

18. During the period in question the State Farm did not have a law library although a few outdated volumes were available, nor did the State Farm has a writ room or inmate council.

19. Legal assistance from the Public Defender was available to inmates on request from inmates.

20. During his tenure at the State Farm, plaintiff requested establishment of a law library, writ room and inmate council.

21. On one occasion plaintiff was observed by defendant Parsons chasing another inmate out of the library with a base ball bat.

22. On or about March 13, 1974, several of defendants determined that plaintiff should be returned to the State Prison.

23. Defendant McDonald made the final decision to return plaintiff to the State Prison.

24. This decision was based in part on plaintiff's activities in taking it upon himself to establish a law library, writ room and inmate council, in part because it was felt that he was pursuing objectives during working hours, not related to duty assignment, as librarian.

25. Plaintiff had not been trained as a librarian but had performed his duties in the library adequately.

26. It was a small library and he was assisted by three inmates and he completed his work early enough to allow free time.

27. At the time of plaintiff's transfer defendant Badger wrote a letter commending plaintiff's work in the library, but stated that in his opinion plaintiff had not lived up to the agreement on writ writing and that his efforts to establish a writ writing procedure and inmate council had caused

some problems for the staff. Defendant Badger further stated that plaintiff's transfer was not considered a disciplinary transfer.

28. No fact finding hearing was held prior to plaintiff's return to the Indiana State Prison.

29. On March 14, 1974, plaintiff was returned to the Indiana State Prison.

30. The conditions at the State Prison were not considered to be as advantageous for plaintiff as conditions at the State Farm.

31. Plaintiff suffered no loss of trusty status or good time nor was he placed in seclusion as a result of the transfer.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the Court makes the following conclusions of law:

1. Not all substantial deprivations imposed by prison authorities trigger the procedural protections of the Due Process Clause. This would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. *Meachum v. Fano*, 427 U.S. 215 (1976).

2. The Due Process Clause of the Fourteenth Amendment does not entitle a duly convicted state prisoner to a fact finding hearing when he is transferred to a prison where the conditions are substantially less favorable to him absent a state law or practice conditioning such transfers on serious misconduct or the occurrence of other specified events. *Meachum v. Fano, supra*; Montayne v. Haymes, 427 U.S. 236 (1976).

3. Whatever expectation a prisoner may have in remaining at a particular prison so long as his behavior is good, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for any reason or for no reason at all. *Meachum v. Fano, supra.*

4. At the time these events occurred, the applicable Indiana statutes and practice did not condition transfer from one state institution to another on proof of serious misconduct or any other specific event and prison officials had the authority to transfer inmates at their discretion. Ind. Code § 11-1-1.1-58 (Burns 1973), State of Indiana Department of Correction, Volume 11, Manual of Policies and Procedures § 2-03.

5. It is within the authority and discretion of penal officials to transfer plaintiff in the first place and return him to his parent institution.

6. Inmates have the right to assistance of counsel or other inmates acting as writ writers in preparing legal papers. *Johnson v. Avery,* 393 U.S. 483 (1969). However, there is no established right of an inmate to be a writ writer while on duty at another assigned job.

7. Damages must not be speculative or probable, and they must be proven to be the proximate result of the complained of wrong. *Classic Bowl, Inc. v. AMF Pinspotters,* 403 F.2d 463 (7th Cir. 1968). The Court concludes, as a matter of law, that plaintiff has failed to prove any damages which proximately resulted from the failure of defendant prison officials to give him a hearing prior to his return to the Indiana Prison. Therefore, plaintiff is not entitled to money damages.

WILLIAM E. STECKLER
United States District Judge

July 8, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1032

DONALD HUDKINS, individually and as Superintendent of the Indiana State Farm,
NORMAN McDONALD, individually and as the Assistant Superintendent of the Indiana State Farm,
PHILIP H. BADGER, individually and as the Director of Treatment and Classification at the Indiana State Farm,
ROBERT E. PARSONS, individually and as the Recreation Director at the Indiana State Farm,
DALE PAT NIXON, individually and as a Counselor at the Indiana State Farm, and
ROBERT HEYNE, individually and as the Commissioner of the Department of Correction,

Petitioners,

vs.

ROY BUISE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN D. BLUMENTHAL
L. PETER IVERSON
JONATHAN E. BUTTERFIELD
Legal Services Organization
of Indiana, Inc.
107 North Pennsylvania—Suite 300
Indianapolis, Indiana 46204
(317) 639-4151

ATTORNEYS FOR RESPONDENT

Central Publishing Company, Inc., Indianapolis, Indiana 46206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1032

DONALD HUDKINS, individually and as Superintendent of the Indiana State Farm,
NORMAN McDONALD, individually and as the Assistant Superintendent of the Indiana State Farm,
PHILIP H. BADGER, individually and as the Director of Treatment and Classification at the Indiana State Farm,
ROBERT E. PARSONS, individually and as the Recreation Director at the Indiana State Farm,
DALE PAT NIXON, individually and as a Counselor at the Indiana State Farm, and
ROBERT HEYNE, individually and as the Commissioner of the Department of Correction,

Petitioners,

vs.

ROY BUISE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

QUESTION PRESENTED

Whether the respondent's First Amendment associational rights were violated by the petitioners' absolute proscription against jailhouse lawyering.

STATEMENT OF THE CASE

The respondent, Roy Buise, was a prisoner of the State of Indiana.[1] In January of 1974 he was transferred from the Indiana State Prison to the State Farm where he was assigned the job of Librarian. During his stay at the State Farm, Buise was barraged by requests from his fellow prisoners for legal advice (Buise had been a writ writer while at the State Prison). Buise in fact assisted one prisoner in the preparation of a writ. Although the state public defender gave only irregular and undependable attention to requests for legal assistance, the petitioners strictly enforced a policy prohibiting the provision of any such assistance by the inmates themselves. In addition, Buise made requests to prison officials that they establish a law library, writ room, and inmate counsel.

In March of 1974, Buise was returned to the State Prison, an institution with living conditions significantly less favorable than those enjoyed by Buise at the State Farm. Buise then brought suit contending that he was transferred solely because he engaged in constitutionally protected activities. He sought declaratory relief, a retransfer to the State Farm, and monetary damages. The trial court agreed with Buise that his activities as a writ writer, accompanied by his attempts to establish a law library, writ room, and inmate counsel, were all significant factors in the decision to return him to the State Prison. However, the Court held that a transfer predicated on the foregoing reasons did not trench upon Buise's constitutional rights. The Court of Appeals reversed and remanded the case to the District Court for further proceedings.

[1]Buise has since been paroled and is no longer confined in any of Indiana's penal institutions.

REASONS FOR DENYING THE WRIT

In reaching its result, the Court of Appeals found it appropriate to analyze Buise's claim for declaratory and injunctive relief separately from his request for damages. With respect to the former, the Court held, consistently with *Johnson vs. Avery*, 393 U.S. 483 (1969), that prisoners have the right of access to a jailhouse lawyer in the absence of a reasonably adequate opportunity to obtain legal assistance from other sources. The Court then concluded that the petitioners had failed to prove the existence of such a reasonably adequate opportunity, and following *Johnson vs. Avery, supra*, held that Buise had standing to assert this right of his fellow prisoners, and was therefore entitled to declaratory relief and a retransfer to the State Farm. The petitioners have not called into question this portion of the lower court's holding.

The Court of Appeals then took up Buise's claim for damages. It held that such a claim cannot be predicated on violations of the rights of third parties. Rather in order to recover damages, Buise must show that some right personal to himself was infringed by the petitioners' absolute prohibition of his writ writing activities. The Court found such a right in the First Amendment's protection of associational rights. It is this holding to which the petitioners take exception.

The petitioners concede that under *Pell v. Procunier*, 417 U.S. 817 (1974), a prisoner may be stripped only of those First Amendment rights which are incompatible with his status as a prisoner or which frustrate the state's legitimate penological objectives. (Petition for Writ of Certiorari, p. 5) This analysis applies whether the right in question implicates speech, worship, association or any other activity protected under the First Amendment. *Jones vs. North Carolina Prisoners Labor Union, Inc.*, 433 U.S. 119 (1977). In *Jones, supra*, this Court, even while recognizing

that imprisonment is the quintessential limitation on associational rights, was careful to approve only those additional restrictions which further reasonable considerations of penal management. *Jones, supra*, 433 U.S. at 132. Conversely, it would be objectionable to interfere with the legitimate, approved associational activities of inmates.

Of course, there is no question that, given the appropriate circumstances, prisoners have the right to have a "jailhouse lawyer," and the petitioners do not question the lower court's determination that those circumstances were extant in the instant case. Nevertheless, the petitioners would have this Court bring the weight of its plenary consideration to the question of whether prison officials may, in the teeth of this right to have a jailhouse lawyer, enforce an absolute prohibition against any prisoner being a jailhouse lawyer.

Moreover, the petitioners would urge this Court to adopt the position that legal assistance can be given and received without implicating some degree of associational activity between the donor and recipient.

The answer to these contentions is firmly imbedded in the logic of the law. The right to be a "jailhouse lawyer" arises simultaneously with the right to have one. This Court recognized this logical and natural connection between the two concepts in *Johnson vs. Avery, supra*, 393 U.S. at 490.

Furthermore, where an inmate has the right to give legal assistance, there must be a related right to associate with his fellow prisoners for that purpose. That this latter right rises to constitutional dimensions has been settled by *NAACP vs. Button*, 371 U.S. 415 (1963), which held not only that the right to associate for the purpose of providing legal assistance falls within the ambit of the First Amendment's protections but also that this right was personal to the

provider of such assistance as well as to the recipient. See also, *In re Primus*, ___ U.S. ___ 98 S. Ct. 1893 (1978).

The anomaly perceived by the petitioners between the contrasting right of free layman to be lawyers and that of prison inmates raises a false issue. Nothing in the lower court's opinion derogates the authority of the State of Indiana to regulate the practice of law, subject only to appropriate First Amendment considerations. *In re Primus, supra*. In the context of the instant case, the petitioners may absolutely proscribe writ writing by inmates simply by implementing a constitutionally adequate public defender system in the prison.

Nor is there anything novel in the notion that a prison inmate might, in certain narrowly defined contexts such as those at bar, have a right to give legal assistance where free laymen do not. This Court, in *Johnson vs. Avery, supra*, recognized that the preparation of petitions for post-conviction relief "is a function often, perhaps generally, performed by laymen." *Johnson, supra*, 393 U.S. at 490, n. 11. Thus, the Court of Appeals has broken no new ground nor has it conferred any new rights on inmates. It in no way expands upon the traditional role performed by prisoners in assisting their fellow inmates to gain access to the courts.

Buise's arguments may be summarized as follows. An inmate retains all his First Amendment rights which are not at odds with legitimate penological concerns. This includes associational rights. An inmate may provide legal assistance to other inmates whenever prison officials fail to make adequate representation from other sources available. The Court of Appeals held that the petitioners did not in fact make such representation available. Consequently, Buise's conduct in providing such assistance falls squarely within the ambit of *Johnson vs. Avery,*

supra. Since his actions were proper, he retains his First Amendment associational rights to the minimum extent necessary to facilitate those actions. Therefore, the action of the petitioners in absolutely forbidding him to associate with his fellow prisoners for the purpose of engaging in a protected activity was in derogation of his associational rights under the First Amendment.

Finally, the petitioners argue that the decision of the Court of Appeals is in conflict with this Court's decisions in *Meachum vs. Fano*, 427 U.S. 215 (1976), and *Montanye vs. Haymes*, 427 U.S. 236 (1976), which held that due process does not require a hearing to test the transfer of a state prisoner from one institution to another. Of course, procedural due process is not an issue in the instant case, thus distinguishing it from *Meachum* and *Montanye*. More importantly, the petitioners blatantly ignore this Court's caveat in *Montanye, supra*, 427 U.S. at 242, where the Court warns that a disciplinary or punitive transfer will not trigger a right to a due process hearing only so long as "the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him *and are not otherwise violative of the Constitution*. . . ." *Id.*, (emphasis added.) Mr. Justice Stevens, in his dissent in *Montanye*, emphasizes this limitation on the scope of the majority's holding. On remand, the Second Circuit Court of Appeals held that Haymes could not have been transferred for exercise of his protected First Amendment rights. This Court declined an opportunity to review that holding. *Haymes vs. Montanye*, 547 F. 2d 188 (2nd Cir. 1976), cert. den. 427 U.S. 967 (1977). Thus, to the extent that the petitioners are claiming that Buise could have been transferred in retaliation for the exercise of his First Amendment rights, their arguments are clearly without merit.

The conclusions of the Court of Appeals are controlled by the principles established by this Court. They do not assume any undecided points of law nor do they require any intuitive leaps across uncharted areas. Under these circumstances, this Court should deny petitioners' request for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the respondent prays that this Court deny the petitioners' request for a writ of certiorari.

Respectfully submitted,

JOHN D. BLUMENTHAL
L. PETER IVERSON
JONATHAN E. BUTTERFIELD
Legal Services Organization
of Indiana, Inc.
107 North Pennsylvania—Suite 300
Indianapolis, Indiana 46204
(317) 639-4151

ATTORNEYS FOR RESPONDENT